ministration of justice in the trial of *United States* v. *James R. Hoffa and Commercial Carriers, Inc.*, in the United States District Court for the Middle District of Tennessee, in violation of Section 1503,[2] Title 18, U.S.C. The defendant was sentenced to pay a fine of $5000 and to serve five years in prison.

The panel of prospective jurors for the *Hoffa* case mentioned in the third count of the indictment was selected on October 1, 1962, and the list was made public the next day. Trial of the case was begun on October 22nd and the jury was seated three days later. Gratin Fields and Mrs. Matthew Walker were members of that jury. The trial ended in a disagreement by the jurors. Judge William E. Miller, the trial judge, then ordered an investigation into charges of jury tampering and empaneled

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([1] Continued)

riers, Inc. (Criminal No. 13241), in the United States District Court for the Middle District of Tennessee, Nashville Division, in that HENRY F. BELL did offer and promise to make available thirty thousand dollars to Nathan Bellamy for the purpose of inducing Nathan Bellamy to communicate with, and to cause others to communicate with, Gratin Fields and Mrs. Matthew Walker, who, as the defendant then and there well knew, were serving as petit jurors in the said trial, and to influence the said petit jurors to vote for the acquittal of James R. Hoffa in the said trial. (Title 18, United States Code, Section 1503.) (Count one was dismissed and the defendant was acquitted on Count two.)

[2] "Whoever corruptly, * * * by any * * * communication, endeavors to influence, intimidate, or impede any * * * petit juror, * * * in * * * any court of the United States, * * * in the discharge of his duty, * * * or corruptly * * * any * * * communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

a special grand jury for that purpose. Judge Miller recused himself from further consideration of the matter and District Judge Frank Gray took over the supervision of the grand jury.

The substance of the charge in the third count of the indictment is that the defendant endeavored to induce Nathan Bellamy, a gambler and restaurant operator, to intercede with jurors Fields and Walker and to influence them to vote for the acquittal of Hoffa. It is alleged in the indictment that the defendant promised to make thirty thousand dollars available to Bellamy. The threshold question is whether there was sufficient testimony introduced by the government in support of the charge in the third count of the indictment to submit the case to the jury.

The sole direct testimony to support the charge was by witness Nathan Bellamy. The substance of this testimony was that in late October or early November, while the Hoffa trial was in progress, the defendant Bell came to see him at his restaurant, the Blackhawk Cafe. The visit lasted about twenty-five minutes, during which the defendant said he understood Bellamy was a gambler and knew how to keep his mouth shut and that it would be worth from five to thirty thousand dollars if he could "tamper" with jurors Fields and Walker and get them to vote for acquittal.[3]

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[3] "Q. And you met Mr. Bellamy—, or you met Mr. Bell in the Blackhawk Cafe?

"A. Yes, sir.

"Q. Would you tell us, Mr. Bellamy, what transpired between you and Mr. Bell at that time?

"A. Well, he asked did I know Mr. Fields and Mrs. Walker and I told him I didn't and he told me it was worth a whole lot of money if I could tamper with them to get them to vote for acquittal.

The testimony of Mr. Bellamy that the defendant came to see him in the Blackhawk Cafe was corroborated by June Ford, a waitress in the restaurant. Mrs. Ford testified that on the morning of the alleged visit of the defendant to the Blackhawk Cafe she answered the telephone and called Mr. Bellamy to the telephone. At the conclusion of this conversation, Mr. Bellamy told Mrs. Ford that a big white guy was coming over to see him and to call him when he came. Mrs. Ford identified the defendant as being the one who later came to see Mr. Bellamy.

Mr. Bellamy was a gambler, engaged in the numbers business or "numbers racket" as it is commonly called. His testimony and that of Mrs. Ford is permeated with a

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([3] Continued)

"Q. Did he specify any figure, Mr. Bellamy?
"A. Well, he said he'd go from five to thirty thousand.
"Q. And did you—, you knew that this Mrs. Walker and Mrs. Fields, did you know they were serving on the 1962 Hoffa jury case?
"A. Yes, sir.
"Q. And that case was in progress at this time?
"A. Yes, sir.
"Q. Did Mr. Bell have anything to say about Mr. Hoffa?
"A. Oh, yes, sir. He—, he said he was a Negro's friend and that the trial would go on until Christmas and that would be a nice Christmas present for the jury so they wouldn't have to be locked up for the holidays.
"Q. Did he use the term 'hang' at any time during the discussion?
"A. Yes, sir.
"Q. And in what sense did he use that?
"A. Well, he said it would only take one to hang the jury.
"Q. And what did you say to him when he made this offer to you, Mr. Bellamy?
"A. I told him I would see what I could do.
"Q. And did you try to do anything?
"A. No, sir."

recognition of this business and its illegality. His reliability as a witness might be subject to question but the government must take its witnesses where it finds them. This business of Bellamy as a gambler and law violator was thoroughly exploited on cross-examination. Mr. Bellamy's testimony, if believed, was sufficient to warrant the submission of the case to the jury. The defendant denied that he ever went to the Blackhawk Cafe and talked to Bellamy. This presented a question of fact for the jury to determine. The credibility of these two witnesses was a proper question for the jury to consider. We find no error on the part of the trial judge in denying the motion for a judgment of acquittal at the close of the government's case.

It is claimed that the court erred in permitting the witness June Ford to testify to a statement made by the witness Nathan Bellamy out of the presence of the defendant. Mrs. Ford testified that when the defendant left the Blackhawk Cafe, Mr. Bellamy followed him to the door and, immediately upon closing the door, he (Bellamy) told her that that man had offered him about $30,000 to tamper with the jury. The court allowed this statement to be admitted into evidence as a spontaneous utterance, which is an exception to the hearsay rule.

Professor Wigmore says there are three basic requirements which must be present before a hearsay statement may be admitted into evidence as a spontaneous exclamation: 1. There must be a startling event sufficient to shock the declarant placing him under stress of nervous excitement; 2. the exclamation must be made while the defendant is still possessed by this state of shock, that is, before he has time to reflect or fabricate; and 3. the exclamation must relate to the circumstances of the event which produced it. 6 Wigmore, Evidence, Section 1750 (3rd Ed.

1940.) This rule known as the res gestae rule has been followed in a number of cases in this circuit.

In *Fort Street Union Depot Co.* v. *Hillen,* 119 F. 2d 307 C.A. 6, cert. den. 314 U.S. 642, two witnesses were permitted to testify that Hillen, the deceased, said at the scene of the accident that he had been riding the corner of a car and had been struck in the back or hip by the grabiron and got knocked off. The court said, at p. 310,

> "To be admissible it must appear that such statements were made under circumstances showing lack of opportunity for reflection. The time elapsing after the injury, the extent of the injuries, and all the circumstances bearing on spontaneity and lack of deliberation are factors to be considered."

The court said further, at p. 311,

> "Much must be left to the sound discretion of the trial judge in rulings on admissibility of evidence of the instant character."

In *Aetna Ins. Co. of Hartford, Conn.,* v. *Licking Valley Milling Co.,* 19 F. 2d 177, C.A. 6, cert. den. 275 U.S. 541, the manager of the claimed insured was permitted to testify that one Bennett, after a telephone conversation with Stone, agent of the insurer, said that the insurance was in effect. See also, *Tuckerman* v. *United States,* 291 F. 958, C.A. 6, cert. den. 263 U.S. 716; *Overland Const. Co.* v. *Sydnor,* 70 F. 2d 121, C.A. 6, cert. den. 293 U.S. 568

Cases cited by counsel for the defendant are not in point. In *Brown* v. *United States,* 152 F. 2d 138, C.A.D.C., the testimony in question was a story that a three year old child told to her mother several hours after an alleged assault and her story to police officers a day or two after the alleged assault. In *United States* v. *Mountain State Fabricating Company,* 282 F. 2d 263, the testimony in

question was a retrospective recital of events concerning a fire which an unidentified person had told the witness who proffered the testimony.

We conclude that the testimony of June Ford to which this assignment of error is addressed was admissible under the res gestae rule and that since the trial judge heard all of the circumstances in connection with it, he acted within his proper discretion in admitting it.

It is claimed that the court erred in not permitting defense counsel to cross-examine Bellamy, for impeachment purposes, on a series of arrests and convictions involving the "numbers racket." The trial judge limited this type of cross-examination to convictions for felonies. The general rule and the rule followed in this circuit is that only such questions as show the commission of a felony or crimes involving moral turpitude are permitted. *Henderson* v. *United States,* 202 F. 2d 400, 405, C.A. 6; *Smith* v. *United States,* 283 F. 2d 16, 22, C.A. 6, cert. den. 365 U.S. 847. In *Smith* v. *United States,* we said it would not be proper to show a conviction for disorderly conduct.

For the purpose of an offer of proof, the defense was permitted to cross-examine Bellamy out of the presence of the jury on the claimed convictions. One of these convictions was in the federal court which apparently was reversed by our Court. Seven of these alleged convictions were for vagrancy and loitering. Four of them were for operating a disorderly house[4] and one was for loitering around a disorderly house. Two others were for keeping a gaming house and for gaming. These offenses herein listed, we think, cannot be considered as involving moral turpitude. Five of the alleged convictions are for violating

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[4] Bellamy testified without dispute that this charge referred to operating a numbers game.

the state lottery law. On one of these the witness said: "Well, you put up a cash bond, you don't go back." This is not a conviction. Whether this applies to all of these cases was not made clear by defense counsel.

Following this proffer of evidence, the district judge permitted defense counsel to cross-examine Bellamy at length concerning his "business". He admitted that he knew he was violating state law and that he was doing it day in and day out and that he was actively engaged in the numbers business at the time the F.B.I. came to visit him. As we said previously, this subject was fully exploited by defense counsel and we find no error on the part of the trial judge in his rulings denying the right to cross-examine on these misdemeanors.

Defense counsel objected to a question that was asked of the defendant on cross-examination for impeachment purposes. He was asked: "Mr. Bell, on February 13, 1945, were you convicted in New York on your plea of guilty to a charge of impersonating a police officer with intent to defraud another person of a sum of money?" He answered that he was, and on redirect-examination, he explained that he was put on probation and made restitution of $1500. The admissibility of this question was argued before the court in the absence of the jury before the defendant took the witness stand. The court ruled that the alleged crime was a misdemeanor involving moral turpitude and was admissible. He also ruled that the matter of time, the crime having occurred twenty years before, went to the weight of the testimony and not to its competence. This ruling was not in error.

By another assignment of error, the defense claims that the court should have dismissed the indictment because the defendant was subpoenaed as a witness before the grand jury, which returned the indictment against him. It is

charged that he was questioned about matters for which he was later indicted; that the trial judge directed the defendant to answer questions which he had refused to answer before the grand jury; and that the trial judge failed to instruct the grand jury that no adverse inference was to arise from defendant's pleading his privilege against self-incrimination under the Fifth Amendment.

We find no merit to this assignment of error. We do not find that the questions presented here were specifically raised by the defendant's motion to dismiss the indictment or that the trial judge ever passed on them, except possibly the one relating to the charge to the grand jury. The mere subpoenaing of the defendant before the grand jury is not per se a violation of his constitutional rights or a ground for dismissal of the indictment. The only questions that the trial judge required the defendant to answer were whether he understood certain questions propounded to him in the grand jury room. Counsel for the defendant cite no instance in their brief where the defendant was required to testify against himself or where he was prejudiced in any way by being subpoenaed before the grand jury. Counsel for the defense argue that the grand jury might have been prejudiced because the defendant stood on the Fifth Amendment and refused to answer questions. The inference is that the grand jury might not have indicted the defendant if it had been properly instructed concerning the defendant's right to take the Fifth Amendment. This claim is untenable. There was adequate direct evidence against the defendant to warrant the indictment. Since we have held the evidence was sufficient to take the case to the jury at the trial, it was obviously sufficient to justify the grand jury in returning an indictment.

We find no merit to the claimed error that the indictment should have been dismissed for the reason that it did not allege an offense and that it was so vague as to amount to a violation of the Sixth Amendment and Rule 7(c) of the Federal Rules of Criminal Procedure. The language of the indictment follows the wording of the statute[5] and is sufficient to "fairly apprise the defendant of the crime intended to be alleged, so as to enable him to prepare his defense and to make the judgment, whether of acquittal or conviction, a complete defense to a second prosecution for the same offense." *Anderson et al.* v. *United States,* 215 F. 2d 84, 86, cert. den. 348 U.S. 888. See also *Russell* v. *United States,* 369 U.S. 749, 763-764; *United States* v. *Debrow,* 346 U.S. 374, 377-378; *Berger* v. *United States,* 295 U.S. 78, 82; *Wright* v. *United States,* 243 F. 2d 546, C.A. 6; *United States* v. *Dickerson,* 337 F. 2d 343, C.A. 6.

Counsel for the defendant charge that the trial judge erred in denying the motion of the defendant for an inspection of a transcript of the testimony before the grand jury. At the commencement of the trial, counsel made a blanket motion for production of statements and reports of prospective government witnesses pursuant to the Jencks Act, (Section 3500, Title 18, U.S.C.) and for a transcript of the testimony of those witnesses who testified before the grand jury and whom the government intended to use at the trial. They made no further request during the progress of the trial based on a particularized need nor did they request the trial judge to make an in camera inspection of the transcript to see if there were any inconsistencies in the testimony of witnesses who testified both before the grand jury and at the trial.

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[5] See footnote 2.

Counsel were not entitled to a transcript of the grand jury testimony as a matter of right. They were only entitled to it when, within the discretion of the trial judge, a showing was made that the ends of justice required it. No such showing was made here. We think the most that counsel was entitled to was to request the trial judge to make an in camera inspection of the transcript and to turn over to them such part as might show an inconsistency in the testimony of a witness. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395; *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677. See also *United States* v. *Keegan,* 331 F. 2d 257, C.A. 7, cert. den. 379 U.S. 828; *Berry* v. *United States,* 295 F. 2d 192, C.A. 8, cert. den. 368 U.S. 955; *United States* v. *Giampa,* 290 F. 2d 83, C.A. 2. We find no error in the ruling of the trial judge on this motion.

Other assignments of error relate to the denial by the court of a motion on behalf of the defendant to transfer the case to another district or division for trial and the denial of a motion for a continuance. On July 22, 1963, a motion was filed on behalf of the defendant for a transfer to another district or division on the ground that there was so great a prejudice against the defendant in the Middle District of Tennessee that he could not have a fair trial in that district. (Rule 21(a) Federal Rules of Criminal Procedure.) This motion was supported by a brief of counsel for the defendant. The basis of this motion, as alleged in the brief, was that the adverse publicity raised by an unfavorable press, "fed by newsleaks" from the government, created a prejudical setting for the trial so that the defendant could not have a fair trial. The trial judge denied this motion with other pretrial motions on October 7, 1963.

We find no evidence to support the claim that the government fed news releases to the press. By October 7th

the unfavorable publicity of which the defense chiefly complains had not developed. The defendant's brief relative to the denial of this motion for a transfer argues the law of transfer rather than any specific reasons for claiming prejudice by reason of unfavorable publicity. Whether a transfer should be granted under Rule 21(a) is a matter of discretion with the trial judge. *Hoffa* v. *Gray,* 323 F. 2d 178, C.A. 6, cert. den. 375 U.S. 907; *Bearden* v. *United States,* 320 F. 2d 99, C.A. 5, cert. den. 376 U.S. 922; *United States* v. *Van Buskirk,* 304 F. 2d 871, C.A. 6; *United States* v. *Koenig,* 300 F. 2d 377, C.A. 6; *Graham* v. *United States,* 257 F. 2d 724, C.A. 6; *Butzman* v. *United States,* 205 F. 2d 343, C.A. 6, cert. den. 346 U.S. 828. We find no abuse of discretion on the part of the trial judge in denying the motion to transfer the case for trial to another district or division.

We turn now to the motion for a continuance which was filed March 31, 1964, on the eve of trial. The reason behind making this motion was that there had been so much unfavorable publicity in Nashville, arising out of the Hoffa trial in Chattanooga, that the defendant could not expect to be tried before a jury free from the prejudicial influence of that publicity. This motion was denied on Saturday, April 4th, and the trial began on Monday, April 6th, in accordance with a previous assignment.

As heretofore indicated, the subject of the charge against the defendant was the endeavor to influence jurors in the trial of *United States* v. *James R. Hoffa and Commercial Carries, Inc.,* which was conducted in Nashville in October and November of 1962. The subsequent investigation of jury tampering in that case led to the return of several indictments by a special grand jury in the United States District Court for the Middle District of Tennessee. These included the indictment against the defendant herein, one

against Hoffa and four co-defendants, and one against Cole and other co-defendants. At the request of Lawrence Medlin, his case was severed from the Hoffa case and by not moving for a transfer he elected to be tried in Nashville.

Judge Gray of the Middle District of Tennessee, by reason of certain developments occurring in November, 1963, recused himself from trying the Hoffa case. Judge Wilson of Chattanooga, Eastern District of Tennessee, was designated to hear the case and upon motion of the defendants transferred the case to Chattanooga on December 28, 1963. This trial began in Chattanooga in the middle of January, 1964, and was concluded on March 4th following. The defendants were all found guilty by a jury and were sentenced a few days later. Medlin's trial began in Nashville on March 30, 1964 and was concluded on April 3rd following. He was also found guilty.

As counsel for the defense say, "The problem of balancing the right of a defendant to a fair trial and the freedom of the press to comment on matters of public interest has continuously plagued the courts." It was evident from the outset that the Hoffa trial would become a cause celebre not only from the national prominence of Mr. Hoffa but because of the subject matter of the charges. It was natural that the newspapers would report the daily progress of this trial which lasted more than six weeks. The newspaper coverage was more than a matter of local interest. Our attention is called, in Appendix A of defendant's brief, to some fifty-one articles reporting the progress of the trial of Hoffa et al. in Chattanooga, that appeared in the two Nashville papers between February 1, 1964 and April 4, 1964.

Only six of these articles referred to the defendant Bell. Three of these indicated that the defendant's trial was

coming up. In an article on the Hoffa trial, under date of February 7th, it was stated that the defendant's trial was set for April 6th under the caption "Union Official faces Bribery Trial in April." On March 10th, in an article entitled "6 Still to Face Jury Tamper Trial," defendant's case was listed as the first "of the remaining six." In an article under date of March 22nd, it was stated "Billie Sol Prosecutor Here to Try Case Against Bell," under heading "Federal Beat: Another Jury Tampering Jury Charge." The article carried a photograph of the defendant with the caption "His Trial Coming Up." It is the usual practice for newspapers to carry announcements of the approaching trial dates in important cases, both criminal and civil. We do not think the defendant can expect to be immunized against such publicity.

Two of the six articles referring to the defendant were announcements of procedures filed on behalf of the defendant in his own case. On February 22nd, on page two of the Tennessean, the headlines were "Judge Asked to Recuse Self." This had reference to defendant's "Petition for Change of Judge," filed on February 21, 1964. This article also stated that the case was set for April 6th. On April 2nd, on page four of the Banner, defendant's motion for a continuance was characterized as "Hearing Slated on Bell move to Stall Tamper." The defendants or his counsel could not expect that the filing of this petition and motion would go unnoticed by the newspapers.

Following the conviction of Hoffa and his co-defendants in Chattanooga, the Tennessean, on March 5th, carried an article entitled "Conviction Climaxes Charges Leveled Here." In this account of the conclusion of the trial, the defendant is named as one of twelve persons indicted. Taken out of context in this same article is a statement, quoting from a federal attorney in Chattanooga, "this is

one of the greatest attacks on the jury system this country has ever known." In the same issue of the Tennessean, the central theme of an editorial was that the "integrity of the jury system" was on trial and the verdict "stands as a beacon with the warning that no one may try to thwart this principle with impunity."

This is the setting, complained of by defense counsel, in which the defendant went to trial. The complaint is not particularly about what was said concerning the defendant and his case but rather that he was identified and associated with Hoffa and was therefore contaminated by all of the publicity on the Hoffa trial. It is to be noted that the newspapers reported only the progress of the trial. They did not attempt to "try the cases in the newspapers," express an opinion of the guilt or innocence of any of the defendants or in any way carry on a campaign for a conviction of the defendants. The very substance of the offense charged in the third count of the indictment is that the defendant endeavored to influence two jurors in the Hoffa trial of 1962. It was for the benefit of Mr. Hoffa that he is charged with endeavoring to influence jurors. Under these circumstances, it is not apparent how he could be disassociated with Mr. Hoffa. At the minute he went on trial, the issue would be whether he was involved in the Hoffa trial of 1962. The defendant's case could not be tried in a vacuum. How long should the trial court have continued the case? One month? Three months? Six months? A year?

We cannot assume nor could the trial judge assume that all prospective jurors in the Nashville area would be so prejudiced by the publicity in the Hoffa trial that they could not fairly try the defendant. The mere recitation of this publicity did not per se give the defendant a right to a continuance or a change of venue. We conclude that the

trial judge did not abuse his discretion in denying the motion for a continuance. See *Dranow* v. *United States,* 307 F. 2d 545, C.A. 8; *United States* v. *Decker,* 304 F. 2d 702, C.A. 6; *United States* v. *Koenig, supra; Beck* v. *United States,* 298 F. 622, C.A. 9, cert. den. 370 U.S. 919; *Delaney* v. *United States,* 199 F. 2d 107, C.A. 1.

Viewing the action of the trial judge in retrospect, it is apparent that he committed no error. Counsel for the defendant were given wide latitude in examining the prospective jurors on voir dire. None of the prospective jurors knew the defendant. Only one, Mr. Post, expressed a feeling of uncertainty as to whether he would be affected if it were brought out that the defendant was associated with Mr. Hoffa. He was peremptorily excused by counsel for defendant. While most of the jurors had read more or less of the Hoffa trial, they all stated under oath that they could decide the case on the evidence and the law as given to them by the trial judge. They all said that they could give the defendant the benefit of the presumption of innocence and acquit him unless his guilt was established beyond a reasonable doubt. None of them had any preconceived opinions as to the guilt or innocence of the defendant. It is significant that only one prospective juror was concerned with a possible association of the defendant with Mr. Hoffa. The defense used only six of the ten peremptory challenges it was allowed under the statute. Rule 24(b), Federal Rules of Criminal Procedure.

In another assignment of error it is charged that the trial judge erred in denying the defendant's petition for change of judge. It is claimed that the petition is directed to Sections 144 and 455, Title 28, U.S.C.

While the petition and affidavit supporting it are signed by the defendant, they were obviously prepared by his counsel. We digress to say that the allegation in the

petition that the trial judge "is incompetent to hear and try this cause" is in poor taste. The issue under Section 144 is prejudice of the judge, not his competence. This Court recognizes Judge Gray as a capable and competent judge.

Section 455[6] is inapplicable in this case. This section is primarily an admonition directed to the judge and "substantial interest" normally contemplates pecuniary or beneficial interest. There is no showing here or any specific charge that he has any interest in the case, that he has been counsel to anyone connected with the case, that he has been a material witness or that he is connected with any party or his attorney so as to render it improper for him to serve. See *Adams* v. *United States*, 302 F. 2d 307, C.A. 5.

The question under Section 144[7] is whether the petition and affidavit meet the requirements of the statute for a change of judge. The district judge correctly stated the law. "If these allegations are sufficient to support the conclusion that the judge has a personal bias or prejudice against the defendant or in favor of the plaintiff, the

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[6] "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

[7] "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, * * *"

judge must proceed no further whether he is actually prejudiced or not." It is the duty of the judge to pass on the sufficiency of the affidavit as a matter of law. See *Mitchell* v. *United States,* 126 F. 2d 550, C.A. 10, cert. den. 316 U.S. 702; *Green* v. *Murphy,* 259 F. 2d 591, C.A. 3; *United States* v. *Simmons,* 302 F. 2d 71, C.A. 3; *Willenbring* v. *United States,* 306 F. 2d 944, C.A. 9; *Knapp* v. *Kinsey,* 232 F. 2d 458, C.A. 6, cert. den. 352 U.S. 892; *Lyons* v. *United States,* 325 F. 2d 370, C.A. 9, cert. den. 377 U.S. 969; *Coppedge* v. *United States,* 311 F. 2d 128, C.A. D.C., cert. den. 373 U.S. 946; *United States* v. *Kravitz,* 303 F. 2d 700, C.A. 3, cert. den. 371 U.S. 922; *Eisler* v. *United States,* 170 F. 2d 273, C.A. D.C., cert den. 338 U.S. 883.

The charges of bias and prejudice may be classified as follows: 1. A portion of the judge's charge to the grand jury which indicated that the judge had some general knowledge that the subject of jury tampering would be investigated by the grand jury; 2. A hearing, in which defendant was ordered to answer non-incriminating questions of the grand jury prior to his indictment; 3. The judge's hearing of evidence on pretrial motions in this case and three related cases and in disbarment proceedings in two other related matters; and 4. The judge's action in recusing himself from two related cases. Section 144 provides, in part, "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, • • •" In *Inland Freight Lines* v. *United States,* 202 F. 2d 169, 171, C.A. 10, the court said:

> "To warrant disqualification of a judge, the affidavit must contain more than mere conclusions on the part of the pleader. Facts must be pleaded which show that there exists personal bias and prejudice on the part of the trial judge."

Upon examination of the petition and affidavit in this case, we find that the allegations are mere conclusions and generalizations. The petition and affidavit do not state the facts and reasons for the belief that bias or prejudice existed. The trial judge was not in error in ruling that the affidavit was insufficient as a matter of law.

One of the questions presented on this appeal relates to the method of selecting the grand jury and the legality of the grand jury that returned the indictments against the defendant and others, as stated on page fifteen herein. Counsel for the defendant and for the government refer the Court to the briefs in the cases of James R. Hoffa and co-defendants, being cases numbered 15876 to 15879 on the docket of this Court. These questions concerning the legality of the grand jury and the method of selecting it were decided adversely to the appellants in those cases on July 29, 1965 (—— F. 2d ——). We follow the decision in those cases and hold that the grand jury was properly selected and legally empanelled.

On August 24, 1964, counsel for defendant filed a motion for new trial on the ground of newly discovered evidence. This motion was denied by the trial judge and counsel for defendant filed a notice of appeal. This appeal was docketed in this Court as No. 16231, *United States of America,* plaintiff-appellee, v. *Henry F. Bell,* defendant-appellant. By order of the Court, this appeal was consolidated for briefing and argument with No. 15968, *United States of America,* plaintiff-appellee, *v. Henry F. Bell,* defendant-appellant.

The alleged newly discovered evidence is that Mrs. Martha Roberts, one of the jurors on the trial of the defendant, did not disclose certain facts on the voir dire examination. Mrs. Roberts' husband, Esque Roberts, from

whom she was separated, was subpoenaed to appear on January 31, 1963, before the grand jury which indicted the defendant. The defendant was subpoenaed to appear before the same grand jury on the following day. It is claimed that Mrs. Roberts knew that her husband had been subpoenaed before the grand jury and withheld this information on voir dire examination. It is further claimed that Mrs. Robert was personally acquainted with Nathan Bellamy and that there was a relationship between them.

District Judge Gray conducted an oral hearing on this motion. In addition to the oral testimony, the judge had before him affidavits of Mrs. Roberts, Nathan Ballamy and attorneys for defendant C. Allen High and Edward B. Henslee, Jr. The burden of the affidavits of counsel was that Esque Roberts told them that his wife was personally acquainted with Nathan Bellamy and that there was a relationship between him and Mrs. Roberts. Esque Roberts was called to testify at the hearing by the court and both sides were given an opportunity to cross-examine him.

We have read the affidavits and the transcript of the testimony. We conclude that the defense failed to substantiate either claim of newly discovered evidence. We agree with the analysis of the evidence at this hearing as made by the trial judge.

> "As to the second ground, the proof utterly fails to clearly shows that Roberts was not a witness before the grand jury and had no knowledge of this case, and the preponderance of the evidence establishes that Mrs. Roberts had no knowledge that he had been questioned or subpoenaed as a witness with respect to the matters before the grand jury. It follows that there was no misconduct on the part of the juror in failing to disclose what she did not know and what would not have disqualified her as a juror if she had known.

"As to the second ground, the proof utterly fails to show even an excuse for the making of the allegations against the juror. * * * Even if, somehow, the interview as represented to this court could provide a basis for the allegations of the affidavits, it is perfectly clear that there was no attempt to determine whether the allegations referred to the time prior to the trial. As lawyers, the defendants' counsel were fully aware of the importance of the time element, and its omission from the affidavits could hardly be inadvertent. Furthermore, the use of the word 'relationship' in reference to a man and a woman juror carries connotations that were unnecessary at least."

The motion for new trial was properly denied.

Judgment of the District Court is affirmed.

APPENDIX B

Nos. 15968-16231
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Henry F. Bell,
Defendant-Appellant.

ORDER

(Filed—Dec 15 1965)

Before: PHILLIPS and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

This cause is before the Court on a petition for rehearing.

It is claimed that the Court failed to pass upon point IV A of the defendant's original brief. By this point counsel for the defendant argued that, accepting the government's evidence as true, it was not sufficient to constitute the offense with which the defendant was charged. The Court said, on page 4 of the opinion: "Mr. Bellamy's testimony, if believed, was sufficient to warrant the submission of the case to the jury." • • • "We find no error on the part of the trial judge in denying the motion for a judgment of acquittal at the close of the government's case." This ruling covers the claim that the evidence, if true, did not constitute the offense charged. The ruling of the trial judge denying the motion for an acquittal

could not have been sustained had this Court found that the evidence, if true, was insufficient to constitute the offense charged.

It is further claimed that this Court erred in sustaining the ruling of the trial judge in limiting defense counsels' cross-examination of the witness Bellamy, with reference to misdemeanor convictions, for impeachment purposes. Further considering this alleged error, we are of the opinion that no prejudice resulted to the defendant by reason of the ruling of the trial judge on the limitation of the cross-examination of the witness Bellamy. Rule 52(a) Federal Rules Criminal Procedure.

While the issue, under Section 144, Title 28, U.S.C., is the bias or prejudice of the trial judge and not his competence, the Court accepts counsels' explanation that the word "incompetent" was used in a legal sense and not intended to reflect on the competence of the trial judge in the sense of a want of judicial ability or judicial learning.

Upon consideration of the petition for rehearing as a whole, it is hereby ordered that it be and is hereby denied.

Entered by order of the Court.

/c/ Carl W. Reuss
Clerk.

APPENDIX C

TRIAL COURT MEMORANDUM DECISION

Although this case is now pending on appeal in the United States Court of Appeals for the Sixth Circuit, the defendant has moved this court for a new trial on grounds of newly discovered evidence. This procedure has been approved in many circuits under Rule 33, Federal Rules of Criminal Procedure. See, *e.g.*, *Smith* v. *United States*, 283 F.2d 607, 610-11 (D.C. Cir. 1960), cert. denied 364 U.S. 938 (1961); *Knight* v. *United States*, 213 F.2d 699, 702 (5th Cir. 1954); *Rakes* v. *United States*, 163 F.2d 771 (4th Cir. 1947). The rule is not so clear in this circuit. See *Metcalf* v. *United States*, 195 F.2d 213, 218 (6th Cir. 1952); *Hamel* v. *United States*, 135 F.2d 969, 970-71 (6th Cir. 1943); *Levinson* v. *United States*, 32 F.2d 449, 450 (6th Cir. 1929).

The motion was heard September 18, 1964, without any question being raised as to the court's jurisdiction. In the view the court takes of the evidence, it may be assumed, without deciding, that the court had jurisdiction to conduct a hearing on the motion without a prior remand.

In his motion, the defendant alleged the discovery of evidence "relating to misconduct of a juror [Mrs. Martha Roberts] in failing to disclose" two facts: (1) that her husband has been a government witness before the grand jury that returned this indictment, and (2) that she was "personally acquainted with the government's chief witness, Nathan Bellamy."

To establish his first point, the defendant had the burden of showing (a) that the juror's husband, Esque

Roberts, was a witness before the grand jury that indicted the defendant; (b) that Mrs. Roberts knew this fact at the time of her *voir dire;* and (c) that her failure to disclose it constituted misconduct.

The defendant showed that Roberts was questioned by Federal Bureau of Investigation agents about matters related to this case in December, 1962, and that he was subpoenaed to testify before the grand jury that returned this indictment, but he did not show that Roberts actually testified. The F.B.I. agent who told of the December interview testified that Roberts did not give them any information of value in the investigation.

The evidence by which the defendant sought to show that Mrs. Roberts had knowledge of her husband's possible connection with the case was entirely circumstantial.

A deputy United States marshal, after several fruitless attempts to find Roberts at his wife's home and at his place of business, finally served the grand jury subpoena on him on Monday morning, January 28, 1963, at the same address as that given by the juror as her address. He was then in pajamas and a robe, but the deputy marshal saw nothing of Mrs. Roberts. Roberts's name appeared in a newspaper, to which his wife subscribed, as one of many persons subpoenaed to appear before the grand jury.

If the desired inferences were drawn as to these matters, it would still require a doubtful further inference to find that the juror had the matter called to her attention upon *voir dire* in a manner that would charge her with misconduct in failing to disclose it. The transcript of the *voir dire* examination shows that she was alert to the questions asked and careful in her answers. Her request to be excused from the jury on grounds of possible inconvenience in her job the following week indicates she had

no motive to conceal facts in order to remain on the jury. She disclosed her acquaintance with two of the persons whose names were mentioned in the indictment.

With the evidence in this shape on the first point, the defendant closed his proof without offering any evidence on the second allegation of his motion. Counsel indicated that the reason for this was that Roberts had changed the story he had previously given defense counsel about his wife's alleged acquaintance with Bellamy.

The government then took the second position that the defendant had presented nothing that required it to respond and declined to call Roberts as its own witness. The court then called Roberts as the court's witness in order to clarify the record and permitted both sides to cross-examine him.

Roberts testified that he and his wife were estranged at all material times, that he visited her home only occasionally, that on the morning he was served with the grand jury subpoena he had been working all night and had hurt his head, that he had gone there to rest and recover from the head injury, that his wife had left the house about the time he arrived, that he had told her nothing about the F.B.I. interview or the subpoena, that he knew of no relationship or acquaintance between his wife and Bellamy, that his conversations with defendants' counsel concerned his desire to find out about the possibility of such a relationship in the summer of 1964.

Defense counsel, in their examination, undertook to show that Roberts had changed his story after an interview with two of the defense attorneys on July 22, 1964. For this purpose defense counsel read questions and answers from a paper purporting to be a transcript of the interview and asked the witness to confirm or deny that

they correctly represented the interview. The transcript had been previously offered in evidence without any groundwork having been laid, but it was not re-offered after Roberts's testimony, and the tape itself was never offered. It was stipulated that, if called, one of the attorneys who participated in the interview would testify that the interview occurred as indicated by the questions on cross-examination.

Although the witness denied having made or heard many of the statements about which he was asked, it could have made no difference on this motion if the questions and answers read to him had been taken as accurately representing the interview of July 22, 1964. The questions and answers were so vague as to leave the subject matter in doubt. Even if it were inferred that some prior unrecorded interview had established the subject as the alleged acquaintance between Mrs. Roberts and Bellamy, there was absolutely nothing to indicate that the acquaintance or suspected acquaintance antedated Mrs. Roberts's service on the jury. Although given every opportunity, defense counsel never offered to present evidence that would put the interview in a significant context.

As to the first ground of the motion, the evidence clearly shows that Roberts was not a witness before the grand jury and had no knowledge of this case, and the preponderance of the evidence establishes that Mrs. Roberts had no knowledge that he had been questioned or subpoenaed as a witness with respect to the matters before the grand jury. It follows that there was no misconduct on the part of the juror in failing to disclose what she did not know and what would not have disqualified her as a juror if she had known.

As to the second ground, the proof utterly fails to show even an excuse for the making of the allegations against

the juror. Since the two affidavits on which this ground of the motion was supported were presented by counsel for the defendant, the court is compelled to mention further that the affidavits, when compared to the evidence, leave them open to serious criticism. Even if, somehow, the interview as represented to this court could provide a basis for the allegations of the affidavits, it is perfectly clear that there was no attempt to determine whether the allegations referred to the time prior to the trial. As lawyers, the defendants' counsel were fully aware of the importance of the time element, and its omission from the affidavits could hardly be inadvertent. Furthermore, the use of the word "relationship" in reference to a man and a woman juror carries connotations that were unnecessary at least.

The proof in this record fails to indicate in any way that Mrs. Roberts was guilty of any misconduct either in or out of court.

The defendant's motion is not well taken in any respect.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 15,968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

HENRY F. BELL,
Defendant-Appellant.

BEFORE: PHILLIPS and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

JUDGMENT
(Filed—Oct 14 1965)

APPEAL from the United States District Court for the Middle District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 16,231

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

HENRY F. BELL,
Defendant-Appellant.

BEFORE: PHILLIPS and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

JUDGMENT
(Filed—Oct 14 1965)

APPEAL from the United States District Court for the Middle District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court
/s/ Carl W. Reuss
Clerk

APPENDIX E

The following is a chronological listing of articles appearing in the Nashville "Tennessean" and "Banner" from February 1, 1964, through April 4, 1964. Each article is described by headline and where no page is indicated, the article originated on page 1.

February 1, 1964, Tennessean: "Tweel Called About Jurors, Hall Testifies." Banner, in its column "In Tamper Trial," "U. S. Case Completion 'Next Week'."

February 2, 1964, Tennessean headline: "Tamper Trial in 3rd Week."

February 3, 1964, Tennessean: "U. S. Readies King Case." Banner: "Witness Says Union Man Met Juror's Husband."

February 4, 1964, Tennessean: "Trooper Ties King to Talks" with photographs. Banner: "Tamper Witness Links 2 of 6 Standing Trial."

February 5, Tennessean: "Surprise Witness Stuns Hoffa." Banner: "Partin Points to Hoffa."

February 6, Tennessean: "Hoffa Tied to Jury Plot." Banner: "Partin Says 'Le Model Life' Before Meeting Union Chief."

February 7, Tennessean: "Partin Stands Firm Under All-Day Quiz." Banner: "In Tamper Case, Defenders Regale U.S. Trial Judge." In this article the readers were informed that appellant's trial was set for April 6, 1964, under the caption, "Union Official Faces Bribery Trial in April."

February 8, Tennessean: "Hoffa, Disspayne Clash in Hall Near Teamster Hotel Rooms."

February 9, Tennessean: "Frantic Hoffa Lawyers Rap Federal Court."

February 10, Tennessean: "Partin's Role Nearing End." Banner: "Jury Tamper Defense Fighting For Mistrial."

February 11, Tennessean: "Tamper Trial Witness Original Testimony Stand."

February 16, Tennessean: "Hoffa Defense Ready To Start." Also see, p. 1, section B for sketches of participants, where evidence of government is described as "designed to show perhaps the most extensive effort at jury-fixing in the history of the American court system."

February 17, Tennessean: "Hoffa to Call 2 F.B.I. Agents." Banner: "Tweel Contradicts Testimony By Partin In Tamper Trial."

February 18, Tennessean: "Sought Loan, Tweel Testifies." Banner: "Dorfman Denies All U.S. Charges In Tamper Trial."

February 19, Tennessean: "Did Not Know Son of Fields, Parks Testifies." Banner: "Tamper Trial Witness Says He Was Hired to 'Harass' Hoffa."

February 20, Tennessean: "19 Calls To Aid Kin: Campbell." Banner: "King Denies He Tried Influence In Hoffa Trial."

February 21, Tennessean: "$600,000 Spent on U.S. Spies: Hoffa." Banner: "Mrs. Partin Set as Tamper Witness."

February 22, Tennessean: "Doctor Denies Partin Shows Addict Signs." On p. 2 of this issue appellant's case also made the headlines, "Judge Asked to Recuse Self," where

it is also noted the case is set April 6, 1964 with attempting to tamper with jurors in the 1962 Hoffa case. Banner: "Huddle Held as Hoffa Nears Witness Stand."

February 23, Tennessean: "Hoffa May Testify Today." Banner: "Hoffa Aide Contradicts Partin Story."

February 25, Tennessean: "Congress Quiz of Trial Talked." Banner: "Hoffa, Hooker Engage In Verbal Duel At Trial."

February 26, Tennessean: "Hoffa Insists On Innocence." Banner: "Defense Completes Testimony In Hoffa Jury-Tamper Trial."

February 27, Tennessean: "Lawyers Argue Case On Monday." Banner: "U. S. Witness Refutes Dope Addict Count."

February 28, Tennessean: "Judge Rebukes Hoffa Lawyers." Banner: "Killing Plot Alleged In Hoffa Trial."

February 29, Tennessean: "Court Ruling Allows Partin Testimony." Banner: "Arguments Readied For Tamper Trial Jury," p. 3.

March 1, Tennessean: "Wilson Allots Argument Time."

March 2, Tennessean: "Hoffa, U. S. At Summation." Banner: "U.S. Charges Hoffa Led Jury Setup Attack."

March 3, Tennessean: "Hoffa Attacked Jury System, U. S. Charges." Banner: "Judge Warns Hoffa Over Loud Shouts."

March 4, Tennessean, "Jury Weighing Hoffa Fate." Banner: "Hoffa Found Guilty."

March 5, Tennessean: "Hoffa Guilty, Will Appeal." On p. 14, in conjunction with the account of the guilty verdict, there appears an trticle entitled, "Conviction Climaxes

Charges Leveled Here," wherein the 1962 Hoffa trial is described as "one of the greatest attacks on the jury system this country has ever known." Appellant is specifically mentioned as one of the 12 persons indicted. In an editorial on p. 16 castigating Hoffa, the central theme is that the "integrity of the jury system" was on trial and the verdict "stands as a beacon with the warning that no one may try to thwart this principle with impunity." Banner: "Hoffa Readies New Trial Fight."

March 6, Tennessean: "Wiretap Invokes 5th in Chattanooga." Banner: "Hoffa's Motions For Mistrial Overruled."

March 7, Tennessean: "Hoffa's Appeal Seen Today."

March 10, Tennessean: In an article entitled, "6 Still To Face Jury Tamper Trial," appellant's case is listed as the first trial "of the remaining six" defendants indicted on charges of tampering with the 1962 Hoffa jury. Specific mention is made of his union affiliation, p. 4.

March 11, Tennessean: "Hoffa Moves For New Trial," on p. 11.

March 12, Tennessean: "Hoffa Returns For Sentencing," on p. 16.

March 13, Tennessean: "Taking 8-Year Term To Top Court: Hoffa." Also included is the comment of the trial judge that Hoffa "tampered with the soul of the nation." Banner: "Hoffa Gets 8 Years."

March 15, Tennessean: "Medlin Trial Set March 30."

March 17, Tennessean: "Who Is Picking Up The Tab for Hoffa," on p. 9. Also on p. 6, "Hooker, Neal In Medlin Trial."

March 18, Banner: "3 Hoffa Case Defendants File Notice." Tennessean: "Bufalino Says FBI Hampers," on p. 8.

March 19, Tennessean: "Court Rebukes Hoffa Lawyer," on p. 3.

March 20, Tennessean: "Hoffa Defense Probe Called."

March 21, Tennessean: "Osborn 'Saw' Hoffa: Beard," and "Special Jury Calls Spindel." Banner: "Osborn Aim to Visit Hoffa Told," on p. 2.

March 22, Tennessean: "Billie Sol Prosecutor Here to Try Case Against Bell," under the heading "Federal Beat: Another Jury Tampering Jury Charge," where appellant is depicted in a photograph with the caption: "His Trial Coming Up."

March 24, Tennessean: "Security Veils Medlin Panel," on p. 7. Also an article where John J. Hooker during a speech to the Rotary Club of Nashville stated a Hoffa juror was asked to give an affidavit that Hoffa did not receive a fair trial.

March 25, Tennessean: "Hoffa Defense Fund Started." Also on p. 3, "Medlin's Attorney To Ask for Trial Delay."

March 26, Tennessean: "Tamper Trial Slated for 3," on p. 7.

March 27, Tennessean: "Postponement Denied Medlin."

March 31, Tennessean, "Full Medlin Jury Is Expected Today."

April 1, Banner: "Bribe Put By Medlin: Witness."

April 2, Banner: "Medlin Denies Charge." Also included in bold headlines from the Chattanooga trial: "U.S. Jury Indicts O'Brien In Hoffa's 'Tamper' case," wherein a

Hoffa aide was charged with offering a bribe to a juror in that case. On p. 2 of this paper immediately following the O'Brien story, appellant's motion for continuance is described as the following: "Hearing Slated on Bell Move to Stall Tamper."

April 3, Tennessean: "Medlin Denies Bribe Attempt," and "O'Brien Indicted on Tamper Charge." Banner: "Medlin Jurors Get Case."

April 4, Tennessean: "Medlin Found Guilty of Jury Tamper Effort."

APPENDIX F

The following includes a summary of pertinent authorities on the subject of the numbers or policy rackets. The list is broken down in an attempt to portray every possible area and authority existing in this country. Where especially pertinent, certain portions of this material have been italicized. Lottery statutes include policy games. See Annotation, "Numbers (or number) game" or "policy game" as a lottery, 105 A.L.R. 305 (1936).

A. Federal and State Statutes Categorizing Policy as a Felony.

United States:

Tit. 18, sec. 1301, U.S.C. (importing or transporting lottery tickets—2 years imprisonment).

Tit. 18, Sec. 1302, U.S.C. (mailing lottery tickets—2 years for 1st offense; 5 years for second offense).

Connecticut:

Sec. 53-298, Conn. Gen. Stat. (as amended) (1961) (policy, second offense: 1 year or $250 or both; third offense: 3 years or $500 or both).

Delaware:

Tit. 11, sec. 670A, Del. Code Ann. (as amended, April 1962) (policy, second offense: 1 year or $3000 or both; third offense: 3 years or $5000 or both).

District of Columbia:

Sec. 22-1501, D.C. Code (1961 ed.).

Illinois:

Ch. 38, sec. 28-1, Ill. Stat. Ann. (Smith-Hurd 1965) policy, second offense).

Indiana:

Sec. 10-2330(3), 2331, Ind. Stat. Ann. (Burns ed. 1956) (professional gambling which includes policy).

Kansas:

Sec. 21-1501, Kan. Gen. Stat. (1949).

Kentucky:

Kentucky Rev. Stat. sec. 436, 360 (lottery).

Maine:

Tit. 17, sec. 1801, Maine Rev. Stat. Ann. (1965 ed).

Michigan:

Sec. 28-604, Mich. Stat. Ann. (lottery, second offense).

Mississippi:

Sec. 2270, Miss. Code (1942) (lottery is a felony—all other gambling is a misdemeanor).

Missouri:

Sec. 563.430, Mo. Stat. Ann. (Vernon's 1953) (lottery is a felony—crime is listed under "offenses against morals").

New Hampshire :

Ch. 577:1, 14, New Hamp. Rev. Stat. (1955).

New Jersey

Sec. 2A:112-3, N.J. Stat. Ann. (1953) (pool selling).

New Mexico:

Sec. 40A19-3, New Mex. Stat. Ann. (1953) (commercial gambling including policy).

New York:

Sec. 974(a), New York Penal Law (McKinney's 1964 supp.) (policy business exceeding $500 per day).

Ohio:

Sec. 2915.13, Ohio Rev. Code Ann. (Page's 1954).

Oklahoma:

Tit. 21, sec. 1053, Okla. Stat. Ann. (1958) (lottery is classified under "Crimes Against Public Decency and Morality").

Oregon:

Sec. 167.405, Ore. Rev. Stat. (1963) (lottery).

Rhode Island:

Sec. 11-19-5, R.I. Gen. Laws (1957) (policy, second and third offenses; however, where the operator owns the premises, it is felony on the first offense. See sec. 11-19-18).

Texas:

Art. 642b, Tex. Penal Code (Vernon's 1952).

Vermont:

Tit. 13, sec. 2151, Vt. Stat. Ann. (1965 supp.) (pool selling—second offense).

Virginia:

Sec. 18.1-340, Va. Code (1950) (policy racket operator punished by confinement for 10 years and a fine).

Washington:

Ch. 9.59.010, Wash. Rev. Code Ann. (1961) (lottery operator punishable by imprisonment for 5 years and a fine).

West Virginia:

Sec. 6104(1), W. Va. Code Ann. (1961) (policy or "numbers" operator punishable by imprisonment for 5 years and a fine).

Wisconsin:

Sec. 945.03, Wisc. Stat. Ann. (West 1958) (lottery).

Proposed Uniform State Anti-Gambling Statute.

B. Miscellaneous State Constitutions and Statutes.

1. Almost three-fourths of the state constitutions expressly prohibit lotteries and specifically direct the legislature to pass laws to suppress this particular form of gambling. Typical provisions are:

California:

Art. 4, sec. 26, Calif. Const. (1908).

Tennessee:

Art. 11, sec. 5, Tenn. Const. (1834): "The Legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets."

2. Certain states categorize lotteries or policy under the statutory subdivision: "Crimes against public decency and morality":

California:

Sec. 319-326, Cal. Penal Code (West 1965).

3. Other states provide a much greater punishment for lotteries or policy than for other types of gambling. See, for instance:

Maine:

Sec. 1801, Me. Rev. Stat. Ann. (1965 ed.).

Nevada:

Ch. 462.010-080, Nev. Rev. Stat.

New York:

Sec. 974(a), New York Penal Law McKinney's 1964 Supp.).

Virginia:

Sec. 18.1-340, Va. Code (1950).

West Virginia:

Sec. 945.03, Wisc. Stat. Ann. (West 1958).

C. Legislative Investigative Committee:

1. Congress:

(a) Senator Keating stated the following in the U. S. Senate in 1961 (Cong. Rec., 87th Con., vol. 107, pt. 7, p. 9525:

> "Organized Crime in America has been called an 'invincible government.' It has its leaders, a treasury, and a rigidly enforced code. It gets expert advice from unscrupulous lawyers, accountants and others. It sometimes functions in cahoots with crooked politicians and public officials. Its leaders hold their power by cunning and brute force. Its treasury consists largely of the proceeds from professional gambling. Its code is enforced by murder when necessary."

(b) Hearings before the Select Committee on Improper Activities in the Labor-Management Field. In the Report of Hearings in this Committee, the subject of "numbers" or "policy" comes up describing the crimes depravity. See Report of Hearings, pp. 12381, 13677 (1958); pp. 18564, 18796 (1959).

(c) Report of Hearings Before the Special Senate Commitee to Investigate Organized Crime in Interstate Commerce.

This report resulted from the 1951 hearings which detailed the depth of organized crime's entrenchment in local communities. The Committee heard startling evidence of public corruption, and of "bought" policemen and public officials. Over and over the main source was told to be "gambling." And, in every major city "numbers" was the most lucrative form of gambling.

> "Organized criminal gangs operating in interstate commerce are firmly entrenched in our large cities in the operation of many different gambling enterprises

such as bookmaking, *policy,* slot machines, as well as other rackets such as the sale and distribution of narcotics and commercialized prostitution." Report of Committee p. 1.

• • •

"Gambling profits are the principle support of big time racketeering and gangsterism. These profits provide the financial resources whereby ordinary criminals are converted into big-time racketeers, political bosses, pseudo businessmen, and alleged philanthropists. *Thus, the $2 horse better and the 5-cent numbers player are not only suckers because they are gambling against hopeless odds, but they also provide the moneys which enable underworld characters to undermine our institutions.*" Report of Committee p. 2. [Emphasis supplied.]

The report goes on to detail criminal activities in the major cities.

It speaks first of Philadelphia:

"The principle organized crime is the numbers game."

• • •

"The numbers game in Philadelphia has achieved the size of a big industry and, like big industry, it appears to be organized on a highly efficient scale. It operates through tight control, manipulated by a politico-gambler-police tie up that makes it impossible for any intruder to edge his way in from the outside. The City is organized into a number of geographical territories, each with its own bank, in turn affiliated apparently with sufficient political connections to be able to operate without too much fear of molestation." Report of Committee p. 46.

The Philadelphia story goes on to cite specific instances of police bribery and public corruption connected with numbers activity. It points a repulsive picture of what

the Congressmen termed a "politico-gambler-police triumvirate."

The Committee turned to Chicago and found a somewhat similar situation existent.

> "The countless investigations revealed that the City of Chicago harbors another huge gambling operation whose income in the millions is built upon a foundation of nickels, dimes and quarters. It is estimated that the play on the policy wheels in Chicago's south side totalled in the past five years $150,000,000."
>
> • • •
>
> "Although for the most part the policy racket has operated in predominately Negro section of the city, the Capone syndicate has found the territory a fertile source of revenue." Report of Committee p. 56.

The report further states incidences where the Chicago syndicate attempted to establish its policy operations as far off as Dallas, Texas.

In Detroit, the Committee found that the numbers racket was "very highly organized." It even became a serious problem in many large industrial plants.

> "The Ford management, the union, the chief of police and an individual worker were in agreement that the practice of gambling was very widespread and the principal problem was the numbers game or policy racket." Report of Committee p. 71.

2. State Legislative Committees:

(a) New York: Comments from A Report of the New York State Comm'n. of Investigation on Syndicated Gambling.

1) Gambling generally:

> "The main font of organized criminal power today flows from three sources—professional gambling, labor racketering and narcotics.

"Easily the most profitable to the underworld and most corrupting of the three—and thus the most dangerous to society—is professional gambling. Expressions of this view may be found in the writings of the principal authorities who have examined the criminal problem. These authorities are in agreement that the best way to cripple organized crime would be to suppress gambling, thereby shutting off the most important source of criminal revenue.

"The authorities have recognized the problem. But they have been unable to translate words into effective action primarily because the import of their findings seems not to have been grasped or successfully implemented.

"The average bettor, the police officer who looks the other way, the judge who lets off a persistent violator with a light fine, still do not seem to comprehend the fact that by their actions they aid and actually encourage the government of the underworld." (Page 1.)

* * *

"Every citizen must recognize that he has a positive obligation to support his government's program against professional gambling. *Enforcement officials and members of the judiciary must learn the true facts and maintain a continuous consistent pressure against this illegal activity.*" (Page 3.)

2) Policy:

"Certainly from the standpoint of the number of players, no professional gambling activity is more widespread in the larger cities than policy, or "the numbers" racket as it is generally known today. It particularly attracts the person of little means since bets of only a few pennies may be made with a possible return of 500 to 1 or 600 to 1, depending on the odds established by the particular numbers ring. The true odds, of course, are 1,000 to 1 so that the policy player is even worse off than most of those who bet with bookmakers." (Pages 58, 59.)

* * *

"Regardless of the manner in which the number has been chosen and despite the already tremendous odds in their favor, policy operators have always attempted to rig the outcome," (Page 60.)

"Because policy appeals to the lowest income group and because it necessitates personal contact and volume play between bettors and runners, it is confined to heavily populated areas where organized criminal control is more evident. As a result, even more than bookmaking, it is regulated by the minions of organized crime." (Page 62.)

(b) Illinois: Report on Hearings on Gambling before the Illinois Crime Investigating Comm'n., March 25, 1964. Senator Canfield:

"Syndicated gambling is the acknowledged first source of revenue for organized crime. This applies wherever in the United States the tentacles of organized crime attempts, and unfortunately too often, succeeds in strangling a disconcerting portion of our economic, social and public welfare. This also applies in the State of Illinois. Syndicated gambling accounts for the single, largest source of revenue for the predatory members of organized crime.

"*Syndicated gambling includes the twenty-five cent bet on a lottery wheel.* It extends to the two dollar horse bet placed with a bookie. It also includes the fifty dollar or five thousand dollar bet on the outcome of a basketball game or prize fight. It means gambling parlors containing gaming devices. It represents past ownership of Havana, Cuba gambling casinos, it encompasses the current invasion into other Caribbean and Central American countries.

"The customers range from the poverty stricken person on welfare relief to the middle-class income family, to the wealthy merchant and businessman, the member of private clubs.

"There is more to syndicated gambling than meets the eye, and there is more than the eye wishes to see. *The policy wheel operation is a good example.* We had proof of this recently when Lawrence Wakefield's home revealed a fortune of three-quarters of a million dollars. His gambling earnings were based on twenty-five cent bets on a lottery wheel; on the surface a harmless thing. On the contrary, it is the genesis of a spiralling evil with the wheelwriter making perhaps fifty dollars a week, the collector getting one hundred dollars, Wakefield making several thousands of dollars weekly from several collectors. Multiply this by perhaps fifty real operators, and you come up with a total, just on this type of gambling, of several million dollars. The syndicate walked in, as is commonly known, about 1950, and told the operators it was taking at least fifty per cent off the top for protection purposes. Holdouts were assaulted, kidnapped and murdered; a case in point was Teddy Roe, gunned down by shotgun fire in front of his home. There is no evidence to indicate that the syndicate has surrendered its lucrative stake."

"Can there be any conclusion other than syndicated gambling is a highly organized, very sophisticated, modern business?

"Profits from syndicated gambling finance the dope traffic, the 'juice' racket, and many other illicit activities, each of which renders big revenues."

Cook County Sheriff Richard Ogilvie in the same hearing:

"I think it's generally conceded that the revenues from gambling furnish the investment capital for many other forms of illegal activities, including the financing of narcotics trafficking, and furnish the capital which has been used by major racketeers in recent years to acquire interest in otherwise, or I should say, on the surface, legitimate businesses which are freely used to protect them from a network type of prosecution on the part of the federal government.

"Estimates of the amount of yearly gambling revenues vary substantially, and depend upon the authority. Recently Attorney General Robert Kennedy places it at a gross volume of seven billion dollars annually. The McClellan Committee places the volume at twenty billion dollars annually, and there is some that go even higher. One federal investigator placed it at forty-seven billion dollars annually. I think whatever the amount, it obviously is a major drain on our economy and poses many dangerous problems."

* * *

"I might also note that in the field of Policy operations, the Chairman noted the recent Wakefield incident, there are two major racketeers in recent years who have had their income tax returns exposed, one through a trial in the Northern District of Illinois and another in a hearing before the select Senate Committee in Washington where these men each reported, this was within the last ten years as I recall, income approximating two hundred fifty thousand dollars each as so-called consultants, one of the policywheels in Chicago.

"In fact, both of these men drew this amount of money from the same policywheel, so it was about five hundred thousand dollars that was taken from one of the major policywheel operations in that county."

Virgil Peterson, Director of the Chicago Crime Commission at the same hearing:

"Every type of gambling nurtures organized crime. Small wagers made by patrons of policywheels make millionaires of racketeers who control them, and invariably syndicate mobsters either take over control or reap rich profits from the nickels, dimes and quarters wagered by policy players.

"For a time there was a myth that the policy racket was controlled by Negroes of lower economic strata. Then, of course, it was established through

books and records and, of course, we always knew that, that such powerful company men, Tony Accardo, and Jake Guzik received two hundred seventy-eight thousand dollars from just one policywheel during one year while additional hundreds of thousands of dollars were received by other racketeers closely associated with them.

"The policy racket has been responsible for bombings, kidnappings, gang killings, typical products of the gambling racket everywhere."

Orlando W. Wilson, Superintendent of Police, City of Chicago:

"Organized crime easily spreads into legitimate businesses on the fringe of bootlegging, gambling and vice like the operation of nightclubs and various service industries such as linen services, dry cleaning establishments, small loan businesses and so on. Often the mobsters gain control of labor unions in one or more of those industries and then utilize the union to enforce their monopoly of a particular industry or field of business.

"Gambling is still by far the most important source of revenue for organized crime, however. In Chicago, most of the syndicate gambling falls into three broad catagories. First, policy and numbers, second, bookmaking, including the booking of bets on athletic contests as well as off-track racehorse betting, and, third, the floating crap games.

"We have very little trouble with slot machines and pinball tables because the law permits us to seize devices and destroy them and each of these devices represents a fairly large capital investment.

"The policy and numbers racket is very difficult to suppress simply because its tentacles are so wide spread. We arrest runners and writers and raid policy stations every day, but that doesn't stop the

day's business or even make much more than a small dent in it. It might hurt the individual runner or writer to take his records for a day, but it does not interrupt or seriously interfere with the lottery as a whole. The winning numbers are announced and the bets are paid off just the same. In order to stop the lottery, one would have to raid simultaneously all of the policy stations, the place where the drawing is held, the headquarters where the records are kept, and the central location where the day's receipts are turned in. These locations are usually separate and widely scattered and rarely do they remain in the same location more than a few days at a time. There is no sizable investment in equipment. To make these widely scattered seizures legally would require four or five or more search warrants. Many hours and days of observations and surveillance would be required to develop the requisite facts needed to constitute probable cause. And what would be the result? A few small fines, perhaps, but the lottery would resume the following day."

D. Authoritative Commentators:

1) Attorney General (now Senator) Robert Kennedy, *The Baleful Influence of Gambling,* 209 Atlantic Monthly, April, 1962, pp. 76-79.

2) Adlai Stevenson, *Organized Crime and Law Enforcement, A Problem for the People,* 38 A.B.A. Jr. 26, 27 (1948):

"I agree also with the additional finding (of the A.B.A.'s Commission on Organized Crime) that the creeping paralysis of law enforcement which results from a failure to enforce the gambling laws spreads to other types of crimes and leads to a general breakdown in law enforcement. This spilling over of gambling profits into other fields of still more intrinsic law-

lessness and danger is one of the principal reasons why I have been against commercial gambling in Illinois and why I always shall be."

3) Hoover, *The War on Organized Crime,* 13 DePaul L. Rev. 195, 197 (1964): Gambling is the mob's "pot of gold".

4) Keating, *Organized Crime—What Can Congress Do About It?,* 51 Journal of Criminal Law and Criminology, 458 (1960).

> "The hired killers, the narcotics peddlers . . . the illegal gamblers . . . intimidate honest citizens, corrupt entire police forces, make the public streets unsafe at night, exploit businessmen and workers. They are a blight upon the land, a running sore of evil. . . ."

5) Peterson, *Gambling, Should It Be Legalized?,* 40 Jr. Crim. L., Criminology & Pol., Sc. 259 (1949) states:

(a) Gambling is the principal source of underworld revenue and with the underworld comes killings, dope, prostitution pay-offs and political corruption.

(b) *Dishonesty has always characterized the gambling business.* Swindlers, con-men and notorious bandits characterize the proprietor class.

(c) The history of the legalized lottery is one of moral failure, and the results have so devastated society that most state constitutions forbid the legalization. The legalized lottery resulted in the furthering of the misery of the poor, the misuse and diversion of funds by the political power and corruption on an enormous scale.

(d) *"It is universally recognized that policy has always been one-hundred percent fraudulent.* It caused untold misery and suffering among the poor.

6) Judge John M. Murtagh, *Gambling and Police Corruption,* Atlantic Monthly, Nov., 1960, vol. 209, p. 49, concludes from his experience in New York's "Gambler's Court":

(a) Payment by policy men to have their prior arrest records altered.

(b) N.Y. City Police Commissioner Kennedy has referred to gambling as "the most corrupting influence since prohibition."

(c) Traces the history of the corruption scandals in N.Y. payoffs to police by professional gamblers. Ever since N.Y. had a police department gambling has corrupted it.

7) Robert K. Woetzel, *Organized Crime in American and Law Enforcement,* 1963 Jr. of Cr. Law 611, 615:

> "The area of activity which made up for the income that was lost to organized crime as a result of the repeal of Prohibition, was gambling . . . Criminals organized various gambling activities, sometimes on a nation wide scale, in particular book making, the numbers racket, and illegal betting on sports events."

8) Manes, *Gambling and the Law,* 42 Jour. of Crim. Law Criminology and Pol. Sc. 205 (1951-52).

(a) It is estimated that in 1950 the public lost 20 billion dollars in slot machines, policy and horse racing. This was one-fourth of the government budget at that time.

(b) Law enforcement is readily corrupted by organized gambling, or even by the unorganized kingpins. (The Hearings Before the Special Committee to Investigate Organized Crime on Senate Resolution

202, 2d Interim Report, 81st Congress, 2d Sess. (1951) p. 569-582 is cited for this proposition.)

(c) Over half of the states even in 1950 were providing for the abatement of gambling establishments by forced ouster and/or sale. (Note 9 at p. 207).

9) Caplin, *The Gambling Business and Federal Taxes,* 8 Crime & Delinquency 371 (1962):

"Gambling profits are the principal support of big time racketeering and gangsterism. There profits provided the financial resources whereby ordinary criminals are converted into big time racketeers, political bosses, pseudo businessmen, and philanthropists."

Cited in the Third Interim Report of the Special Committee to Investigate Organized Crime in Interstate Commerce, 1951 S. Rept. 307, 82d Congress, 1st Session, pp. 1-2.

10) Cook, *Gambling, Inc.,* 191 *Nation* 257 (1960):

"Professional gambling today is the most lucrative most destructive and most widely tolerated form of crime in the country. For in point of fact, the public knows almost nothing about contemporary gambling; what it knows is a series of myths handed down from the days when gamblers sported waxed mustaches and traveled the river boats with derringers hidden in their sleeves. And this outdated sophistication in the principal asset of gambling, Inc. As long as the public persists in its ignorance, the success of the enterprise is assured . . . Each year the revenues that pour into the coffers of Gambling, Inc., are used to bribe elected officials, to oil political machines, and to corrupt police and other law enforcement agencies on a scale so staggering it has not yet been truly measured." (257)

"Behind the venality of police lies, the true source of corruption—the unholy alliance of the underworld

and politics. A net annual gambling take of hundreds of millions of dollars buys a lot of votes and influence, and even if a policeman wants to be honest, he frequently does not dare because the elected officials who outrank him are obligated." (p. 259)

11) Siragusa, *The War on Organized Crime in Illinois*, 2 Ill. Continuing Legal Education, No. 4, p. 67, 73-74 (1964):

"Gambling is the biggest racket of them all. Some say it represents a $45 billion annual take. Others claim this figure applies to all rackets, gambling included. The Mob's gambling proceeds in Illinois have been estimated in the several millions. As impossible as it is to arrive at a fairly accurate financial picture, syndicated gambling robs huge income from our economy. Ordinarily, Americans measure importance, gravity and concern in terms of dollars and cents. Morality generally plays second fiddle. We react instantaneously, violently and with horror against the dope peddler and white slaver, principally from the moral standpoint and secondly in relation to the dollar sign. However, other strictly commercial-type syndicated operations do not provoke these feelings and attitudes. Syndicated gambling is the epitome result of the public's passivity.

"It has been exclaimed, proclaimed and repeated time and time again by law enforcement officials, grand juries, congressional and state public hearings, the news media and others, deeply concerned with the syndicated gambling problem, that "the $2 bet means murder," that gambling proceeds feed the dope and white slave traffic, enable the Outfit, the Mafia, the Mob to muscle in and buy staggering chunks of legitimate business and otherwise to spread out criminally and "legitimately".

12) Gerard L. Goettel (former deputy chief of the Attorney General's Special Group on Organized Crime), *Why the Crime Syndicate Can't Be Touched,* Harpers, Nov., 1960, v. 221, p. 33:

> "In the commoner areas of vice, the racketeers have found that local police and public officials in most places, can be easily tamed. Minor gambling and prostitution excite only sporadic moral indignation, and once a policeman or politician has been 'bought' for one purpose, he is easy to control for all."

13) Zumbrun, *Maryland, A Law Enforcement Dilemma,* Annals of the American Academy of Pol. & Soc. Science, May, 1963, v. 347, p. 58:

> "Findings of the Kefauver and the McClellan committees of the U.S. Senate offer ample evidence of the extent of criminal power in America—a power based largely on revenues of national gambling networks. As the U.S. Attorney General said, "organized crime in America is financed to a large degree by the $2.00 bet placed by the otherwise law-abiding citizen."
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> "It is submitted that today, however, the greater harm is not the slight pecuniary loss to the average citizen nor any subsidiary idleness, but, rather, the criminal empires which the revenue of gambling support and the resultant corruption of many law enforcement and elected officials across the nation by these criminal elements."

APPENDIX G

The following includes that portion of the Statement (pp. 36-42) and Reasons for Granting the Writ (pp. 70-76) from the Petition for Writ of Certiorari in *James R. Hoffa* v. *United States of America,* relative to the illegal and improper impanelling of the Special Grand Jury which returned indictments against petitioner and James R. Hoffa.

5. The Grand Jury selection. (a) (b) Suggestor system.

Petitioner filed a timely motion to dismiss the indictment on the ground that the Grand Jury was illegally impanelled (I D.A. 75a-77a). He alleged that the Jury Commission illegally delegated its duty to select names for the jury box to non-official "suggestors," who did not represent a fair cross-section of the community, resulting in the exclusion of cognizable groups of the community from the jury box, the juror venire, and the Grand Jury. The motion was supported by an investigative analysis of the suggestors, the juror venire and the Grand Jury. This showed that all but seven of the ninety-one suggestors were banks, bankers, postmasters, and local State Court officials. (I D.A. 84a-85a). None was a blue collar wage earner, manual laborer, or representative of organized labor.

The venire of one hundred persons included only one person who had ever been a labor union member, four Negroes, two Catholics, and one Jew. There were no current labor union members or blue collar wage earners. The Grand Jury selected therefrom was all white, Protes-

tant, non-union, and none of them was of the manual labor class (I D.A. 76a, 77a-159a). Petitioner requested a hearing and offered to prove the foregoing facts. (I D.A. 77a, 78a).

It was admitted that the Jury Commission sent out a batch of form letters to a group of non-official persons known as "suggestors" (I D.A. 160a-161a), requesting the recipients to supply names of jurors "which will be a fair cross-section of the entire population of your community" (I D.A. 162a-163a). Ninety-one "suggestors" responded (I D.A. 79a-83a), and submitted a total of about 365 names. The Jury Commission placed the names so received into the jury box, neither investigating the persons named nor submitting questionnaires to them. The Jury Commission did nothing whatever to determine whether the persons whose names were submitted by the suggestors constituted a valid cross-section of the community, whether the instructions to the suggestors had been complied with, or whether the persons whose names were submitted were qualified. (I D.A. 161a-165a). The Clerk justified this delegation of official duty by the statement that "it has been my experience that the suggestors I and Mr. Climer pick do return only the names of qualified persons and can be relied upon to do so." (I D.A. 161a).

The Jury Commissioner and Clerk made no effort to judge whether a cross-section had been obtained. They added 15 to 20 names of other persons and placed them in the box with the 365 "suggested" names. The grand jury venire of 100 was selected at random therefrom. (I D.A. 161a, 165a).

The Court ordered argument on "whether a sufficient showing has been made to authorize an inquiry whether

the manner in which the suggestor system was used in selecting the present grand jury was such as to invalidate the indictment," and ruled that "no testimonial evidence" could be received on the issue "without a preliminary showing that a material factual issue has been raised requiring resolution." (I D.A. 166a-167a).

Petitioner made a written offer of proof. As to the delegation of the duties of the Jury Commission to the suggestors, petitioner offered to prove that the Commission did not: (1) make any determination of the qualifications of the prospective jurors obtained from the suggestors; (2) obtain any information from the suggestors other than the names and addresses of prospective jurors; and (3) gave no assistance and made no suggestions to the suggestors as to sources for obtaining a fair cross-section (I D.A. 155a-156a). As to the allegation that the Jury Commission used a restricted class of suggestors "for the purpose of systematically excluding cognizable elements of the community," petitioner offered to prove that: (1) the suggestors used were biased and prejudiced against Negroes, Catholics, Jews, and manual or blue collar workers, and no suggestor knowingly sent in the name of any member of a labor organization; (2) Postmasters as political appointees are biased and the Acting Postmasters, since they are awaiting final appointment, are especially biased and prejudiced in favor of the U.S. Government; and (3) no suggestor, although so requested, selected a fair cross-section. (I D.A. 156a-159a).

Petitioner subpoenaed and produced the Clerk, the Jury Commissioner, and seventy-seven of the suggestors. (I D.A. 377a-411a). The Court refused to receive their testi-

mony.[10] The motion to dismiss the indictment was denied. The Court ruled that "no foundation" for such reception of evidence had been laid and that "the one hundred names show in and of themselves that there was no systematic exclusion of any cohesive group in the community." (I D.A. 171a-181a; 419a-420a).

The Court of Appeals approved the District Court's refusal to receive petitioner's proffered proof. On the issue of illegal delegation of duties, the Court of Appeals relied on *Scales* v. *United States*, 367 U.S. 203, as approving the suggestor system. Without benefit of evidentiary hearing, the Court of Appeals further relied on its own factual findings that "the purpose of using suggestors was to obtain an impartial jury drawn from the names of persons representing a cross-section of the community"; and that: "The Clerk and Jury Commissioner remained in control. They reviewed the lists and placed additional names in the box." (Appendix A, infra, pp. 9a-10a).

On the issue of systematic exclusion of cognizable groups in the community, the Court relied on *Glasser* v. *United States*, 315 U.S. 60, 87, for the proposition that

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[10] The Court permitted examination of the Clerk limited to whether he had known that the one Jew on the venire was the client of petitioner's counsel. (I D. A. 413a). The Clerk testified that he could not recall ever before placing the name of a Jew in the jury box, or ever receiving the name of a Jew from a suggestor (I D.A. 417a). Petitioner's counsel agreed with the judge's statement that the Clerk would testify, as he had in a related case, that he had made "no other specific investigation" of prospective jurors obtained from suggestors, other than to inform the suggestors as to jury qualifications, and to eliminate and supplement the names obtained from suggestors solely for the purposes of allocation among the counties in the District (I D.A. 402a-404a).

"the evidence must be more than mere statements of counsel of what they hope they will be able to prove." (Appendix A, infra, p. 11a). On the basis of the Court's construction of those two opinions, it found the offer of proof of complete delegation and prejudiced selection insufficient to warrant reception of the evidence proffered by the petitioner, because his counsel had not given "the names of witnesses and what their testimony would be in support of the charges contained in the motion," but had only stated "that the proof would come from the testimony of the Clerk, the Jury Commissioner and the seventy-seven suggestors" on hand. (Appendix A, infra, p. 8a).[11]

Finally, the Court recognized petitioner's showing of the disproportion of Negroes and Catholics on the jury venire as against their numbers in the population. But the Court affirmed the denial of a hearing because the jury venire had at least some members or members from each group claimed to have been systematically excluded, and "it is not required that there be a proportionate representation in the grand jury panel of all classes and religions." (Appendix A, infra, p. 11a). However, petitioner had urged the disproportion as warranting an evidentiary hearing on the issue of systematic exclusion.

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[11] The Court below also stated that "defense counsel had talked to only one suggestor at the time." Appendix A, infra, p. 8a. This, in context, had reference to petitioner's counsel, and was not true even as to him. He had talked with several suggestors. (I D. A. 396a, 401a). The record is silent as to other bases for the offer of proof derived from petitioner's trial counsel, other counsel for petitioner, counsel for co-defendants who had joined in the motion and offer of proof, investigators for any of them, and other sources.

(c) The Grand Jury voir dire.

For years immediately preceding his indictment here, petitioner was the subject of extensive, continuous, and prejudicial publicity, nationally, and locally in the Middle District of Tennessee. In the four months before the impanelling of the Grand Jury, including the period when the suggestors were choosing the names for the jury box, the local publicity, particularly, was intensified. Such intensification of prejudicial publicity in the area centered on the trial of petitioner in the Test Fleet case out of which arose the present charges of jury tampering, and the extraordinary public announcement by the trial judge in that case of receipt of evidence supporting those charges and the impanelling of a special Grand Jury to investigate them.[12] (I.D.A. 166a, 204a)

In convening petitioner's Grand Jury, the District Judge assumed that many members of the venire had been reached by the publicity. As the District Judge put it (I.D.A. 204a):

> "Many of you have no doubt read in the newspapers or heard on the radio that there is to be a special grand jury to investigate a particular matter. This is not strictly accurate. There is no provision in the federal statutes for a special grand jury . . . But in one sense, the jury selected here this morning will be a special grand jury. It is no secret that the decision to impanel a second grand jury this term resulted from reports that improper efforts had been made to influence the verdict of a

[12] The publicity is documented in the record. See supra, p. 17 ff. Were it necessary this Court could judicially notice the fact that seldom, if ever, in our history, has any single citizen had to bear the weight of repeated official investigation, prosecution, and attendant loss of good name imposed upon petitioner.

petit jury in a *highly publicized criminal case* recently tried before the chief judge of this court." (Emphasis supplied.)

Addressing the 23 members of the venire who became the Grand Jury, the District Judge without reference to petitioner, asked four routine general questions, on open-mindedness and prejudice. (I.D.A. 206a-207a).

At no time during the voir dire of the Grand Jury, did the District Judge refer to petitioner by name. No prospective juror was asked whether he had read about, heard about, or discussed matters adverse to petitioner. No prospective juror was asked the extent to which his reading, hearing, or discussing of matters adverse to petitioner had resulted in a feeling, predisposition or prejudice against petitioner. No caution no bias and open-mindedness was made specific; everything was kept very general.

The District Judge denied petitioner's motion to dismiss (I.D.A. 12a-13a). In a memorandum opinion (I.D.A. 181a-182a) the District Judge assumed that the prospective jurors had read and would continue to read adverse publicity. The District Judge stated he had charted his course in the Grand Jury voir dire by the three opinions in *Beck* v. *Washington*, 369 U.S. 541. The District Judge observed, "If there is a better [course], some appellate Court must chart it." (I.D.A. 182a).

The Court of Appeals held the voir dire inquiry was sufficient, for "it was not necessary that the Court furnish the jurors with the names of each person who might be investigated and direct specific inquiries as to bias and prejudice against him." (Appendix A, infra, p. 16a).

5. The Grand Jury selection.

(a) (b) Suggestor system as here employed.

The duties of the Clerk of Court and Jury Commissioner under the federal statutes governing jury selection (28 U.S.C. Sec. 1861, et seq.) are to select jurors who are qualified and to select them from a cross-section of the community so that a jury is truly representative. These duties of the Clerk and Jury Commissioner on jury selection cannot legally be delegated.[23] Here, the Court of Appeals held petitioner not entitled to show by the testimony of the Clerk and Jury Commissioner that, as the record already indicated, they performed no duties at all with respect to over ninety (90%) percent of the names in the jury box from which the grand jury was drawn, other than to accept such names from suggestors and place them in the box—without checking their qualifications and without exercising any judgment as to cross-section. Indeed, the Commission was without any information (just name and address) on which to determine qualifications or the representative nature of the names placed in the jury box.

The Court's reliance in this connection on *Scales* v. *United States*, 367 U.S. 203, 257, misconstrues that decision. In *Scales*, the Clerk and Jury Commissioner checked on the prospective grand jurors obtained from suggestors

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[23] *Glasser* v. *United States*, 315 U.S. 60, 85; *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 35 (C.A. 8), cert. den. 360 U.S. 936; *Wilson* v. *United States*, 104 F. 2d 81, 82 (C.A. 5), cert. den. 308 U.S. 574; *Thiel* v. *Southern Pac. Co.*, 67 F. Supp. 934, 942, aff'd 149 F. 2d 783 (C.A. 9) rev'd on other grounds 328 U.S. 217; *Dow* v. *Carnegie-Illinois Steel Corp.*, 100 F. Supp. 494, 498 (W.D. Pa.), rev'd on other ground, sub nom, *Dow* v. *U. S. Steel Corp.*, 195 F. 2d 478 (C.A. 3); *In re Petition for Special Grand Jury*, 50 F. 2d 973 (M.D. Pa.); *United States* v. *Murphy*, 224 F. 554, 564 (N.D.N.Y.).

by requiring such prospective grand jurors to complete an information questionnaire, and by personal inspection of such questionnaires. There was no such precaution here.

The holding of the Court below conflicts with the rationale of the Court of Appeals for the Fifth Circuit in deciding *Wilson* v. *United States,* 104 F. 2d 81, cert. den. 308 U.S. 574. There, the Clerk and Jury Commissioner required each person whose name had been submitted by a suggestor to complete a questionnaire showing full name and address, age, occupation, and basis, if any, for release from jury duty. In rejecting a defense claim of prejudice because of the sending of the questionnaires, the Court held that "it was the duty of the Jury Commissioners to make inquiry before the names of jurors were placed in the box." 104 F. 2d at p. 82. Here, admittedly, neither the Clerk nor the Jury Commissioner, made any inquiry.

This Court has not passed upon the question of whether the intention of the Congress to commit the selection of qualified and representative jurors to the discretion and judgment of the Clerk of Court and the Jury Commissioner is frustrated by use of a suggestor system in which those officials merely inform suggestors of what they (the Clerk and Jury Commissioner) seek, and blindly accept what the suggestors chose, without any independent check, investigation, or significant review by either the Clerk or Jury Commissioner. The question is an important one of federal law which should be decided by this Court, to effectuate the intent of Congress.

In 1960, the Judicial Conference Committee on the Operation of the Jury System found that a substantial minority of the federal districts do not check the names

received from suggestors by questionnaire to, or personal interview with, prospective jurors. 26 F.R.D. 411, 439. Accordingly, the Committee repeatedly recommended that questionnaires should be used in all instances, supplemented by personal interview where possible. 26 F.R.D. at 419, 428, 435, 438, 448, and 471. Such a practice enables the Clerk and Jury Commissioner to exercise non-delegable duties of judgment and discretion committed by the Congress to their care. It is the prevailing practice.[24] The contrary practice herein approved is followed in the Middle District of Tennessee, and in a minority of other federal districts.[25] The minority practice leaves no room for the exercise of judgment and discretion by the Clerk and Jury Commissioner, and supplies no information for the exercise of such judgment and discretion. So long as the minority practice is permitted to continue, the well-settled doctrine of the non-delegable nature of the duties of the Jury Commission is emptied of content and made meaningless in some sections of the country.

Additionally, here, despite petitioner's proffered testimony of the Clerk, the Jury Commissioner and the suggestors, the District Court refused to permit petitioner to introduce any proof of the systematic exclusion of

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[24] See, for example, *Beatrice Foods Co.* v. *United States,* 312 F. 2d 29 (C.A. 8); *Padgett* v. *Buxton-Smith Mercantile Company,* 283 F. 2d 597 (C.A. 10); *Windom* v. *United States,* 260 F. 2d 384 (C.A. 10); *Scales* v. *United States,* 260 F. 2d 21 (C.A. 4); *Wilson* v. *United States,* 104 F. 2d 81 (C.A. 5); *United States* v. *Romano,* 191 F. Supp. 772 (D.C. Conn.); and *Dow* v. *Carnegie-Illinois Steel Corp.,* 100 F. Supp. 494 (W.D. Pa.).

[25] See, for example, *Walker* v. *United States,* 93 F. 2d 383 (C.A. 8), cert. den. 303 U.S. 644; *United States* v. *Shannabarger,* 19 F. Supp. 975 (W.D. Mo.); and *United States* v. *McClure,* 4 F. Supp. 668 (E.D. Pa.).

Negroes, Catholics, Jews, manual or blue-collar workers, and members of organized labor.

Further, the refusal of the Court to hear testimony prevented the petitioner from proving that the suggestors themselves were selected from, and were members of, narrowly restricted classes within the community. The prejudice to fair selection resulting therefrom was increased by the fact that 45 of the 91 suggestors were political appointees of the plaintiff in this prosecution. Cf. *United States* v. *Murphy,* 224 F. 554 (N.D. N.Y.).

In approving such denial of hearing, the decision of the Court below is in conflict with decisions of this Court and the Third Circuit. *Dow* v. *U. S. Steel Corp.,* 195 F. 2d 478 (C.A. 3) holds that the non-particularized assertion by counsel of systematic exclusion of cognizable groups in the community from the jury requires the reception of evidence even though no statement is made as to what evidence will be given by any prospective witness. The requirement of the Court below that petitioner's offer of proof detail the evidence to be offered is also in conflict with *Carter* v. *Texas,* 177 U.S. 442. There, the Court held that the defendant was entitled to present his evidence on systematic exclusion although he had not given "the names of the witnesses whom [he] proposed or intended to call," or stated "their testimony in detail." 177 U.S. at p. 449. The recently decided case of *Coleman* v. *Alabama,* 377 U.S. 129, is in accord.

Finally, the Court below has misapplied *Glasser* v. *United States,* 315 U.S. 60, and *Frazier* v. *United States,* 335 U.S. 497, upon which it relied. In those decisions there was no tender or offer of proof; here petitioner had his witnesses present to prove systematic exclusion.

To require more would be effectively to destroy petitioner's constitutional right to an impartial grand jury.

Moreover, the court misapplied the *Glasser* standard that "distinct evidence" of discriminatory selection must be introduced or offered before a "full-scale investigation by the court" will be held (Appendix A, infra, pp. 11a, 14a). Petitioner's showing established, by any reasonable analysis, a strong likelihood that the elite group of selectors had produced an elite group of prospective jurors to the virtual exclusion of labor union members, "blue collar" wage earners, Negroes, Catholics and Jews. (*supra*, pp. 36-40). Thus the "distinct evidence" test was satisfied. The court below denied a hearing on the basis of minor "discrepancies" in the showing (Appendix A, infra, pp. 11a-12a). But such "discrepancies" are inevitable in proof compiled without the benefit of the subpoena power and a full hearing. There is thus presented a question important to the administration of justice whether discriminatory selection must be proved to the hilt before a hearing on the subject can be had.

(c) The Grand Jury voir dire.

The District Court explicitly recognized the widely known fact that the grand jury was being convened for the purpose of investigating petitioner and his alleged unlawful activities in the Test Fleet trial. (I D.A. 204a). Nevertheless, at no time during the voir dire of the grand jury did the District Judge refer to the petitioner by name. No prospective juror was asked whether he had read, heard about, or discussed matters adverse to petitioner. No prospective juror was asked the extent to which his reading, hearing, or discussing of matters adverse to petitioner had resulted in a feeling, predisposition or prejudice against petitioner.

The Court of Appeals ruled that "It was not necessary that the Court furnish the jurors with the names of each person who might be investigated and direct specific inquiries as to bias and prejudice against him." This holding is in conflict with the ruling of this Court in *Beck* v. *Washington,* 369 U.S. 541. In *Beck,* a 4 to 3 decision, the majority rejected Beck's contention that he had been denied equal protection by the trial judge's references to the Teamsters while impanelling the grand jury. The opinion of Mr. Justice Clark, joined in by Justices Harlan, Brennan, and Stewart, rejected Beck's contention on the ground that "The complete answer to petitioner's argument is that references to the Teamsters were necessary in the voir dire to eliminate persons who might be prejudiced for or against petitioner and in the instructions to explain the purpose and scope of this special body." *Beck,* at p. 549.

Thus, not only did the trial judge in *Beck* inquire as to whether the jurors were personally prejudiced against Beck, but in addition, this Court held that additional reference to Beck's organization, the Teamsters, was necessary to eliminate prejudiced persons from the grand jury. Here, *a fortiori,* in substantially identical circumstances, involving a President of the Teamsters, much maligned by much publicity, it was necessary for the District Judge to inquire specifically by name as to whether any of the jurors were prejudiced against petitioner in order to eliminate prejudiced persons from the grand jury. See the dissenting opinions in *Beck* v. *Washington, supra.* The failure of the District Judge to do so—his production, as it were, of "Hamlet" without reference to Hamlet—left any prejudiced juror free to serve on the grand jury with some salving of conscience by way of

what the District Judge's generalities on bias and open-mindedness might have reference to.

The three opinions in *Beck* exhibit a disagreement among seven members of the Court on a question of importance in application of the Constitution and supervision of the administration of justice in the federal courts. That question is whether a claim of deprivation of a defendant's right to an unbiased grand jury is sufficiently supported by a showing of procedures unfairly inadequate for obtaining an unbiased grand jury, or whether a showing of actual bias in the grand jury is required. Contrast in *Beck* the opinion of Justice Clark (joined by three justices), 369 U.S. at 545-546, 548-549, to the dissenting opinion by Justice Black (joined by the Chief Justice), 369 U.S. at page 563, and to the dissenting opinion of Justice Douglas, 369 U.S. at p. 579. The question has never been passed upon by a majority of the nine members of the Court. It should be resolved here.

Respectfully submitted,

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